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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 620

THE DELAWARE AND HUDSON COMPANY,
Petitioner,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY and CONNECTICUT RAILWAY AND LIGHTING COMPANY,
Respondents.

BRIEF OF RESPONDENT, THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Opinions Below

The opinion of the Court of Appeals is reported at 227 F. 2d. 291 (Pet. App. 12).[1] The opinion of the District Court (A. p. 38a) is reported at 128 F. Supp. 550.

Jurisdiction

The judgment of the Court of Appeals was entered on November 7, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254.

[1] References to the petition will be indicated by "Pet. ....." References to the petitioner's Appendix filed in the Court of Appeals will be indicated by "A. ....." References to the Appendix annexed to the petition will be indicated by "Pet. App. ....."

Question Presented

The Petitioner (herein called "Delaware") propounds a question which is not "expressed in the terms and circumstances of the case" (Rule 23(1)(c) of the Revised Rules of the Supreme Court). Delaware incorrectly states that its claim was disallowed on the ground that it was not capable of liquidation or of reasonable estimation as defined by Section 57d of the Bankruptcy Act (11 U. S. C. Section 93(d)) (Pet. 2). Actually, Delaware's claim was disallowed because the reorganization court found it to be valueless. The question presented, properly stated, is whether a creditor whose claim has been disallowed as valueless may share in a fund of common stock reserved by the reorganization court to satisfy claims which had not been liquidated at the date of the entry of the Final Decree and Consummation Order.

Statutes Involved

The statutes involved are set forth, in pertinent part, in the petition (Pet. 2, Pet. App. 23-25).

Statement

(A) The Facts Concerning the New Haven Reorganization:

The Boston Railroad Holding Company (herein called "Boston") was chartered in 1909 by the Commonwealth of Massachusetts. All of its common stock was then and thereafter owned by The New York, New Haven and Hartford Railroad Company (herein called "New Haven") (A. 39a).

In 1910, following an amendment to its charter, Boston issued a large block of $100 par value preferred stock

which New Haven acquired. The preferred stock provided for cumulative dividends, payable semi-annually, and a preference, upon dissolution or liquidation of Boston, "to payment of the par value thereof and accrued dividends" (A. 39a-40a).

In 1911, New Haven sold 28,000 shares of Boston's preferred stock to the public. New Haven guaranteed payment of the cumulative dividends and the sum of $100, upon each share of the publicly held preferred stock "in case of liquidation or distribution" of Boston (Pet. App. 13-14).

In 1935, New Haven filed a petition for reorganization under Section 77 of the Bankruptcy Act. At that time, 24,150 shares of Boston's preferred were held by the public (Pet. App. 14).

On March 30, 1936, the President of Boston filed unsecured Claim 82 for dividends due on Boston's preferred from January 10, 1936 and thereafter and for the par value of said preferred stock (A. 65a-67a). Subsequently, a Protective Committee for preferred stockholders (herein called the "Protective Committee"), with the approval of the Interstate Commerce Commission, became the representative of the then publicly held shares of preferred.

On March 22, 1940, Division 4 of the Interstate Commerce Commission recommended disaffirmance of the guaranty[2] (Pet. App. 15).

On April 3, 1941, the Protective Committee filed a petition for Order 570 to compel New Haven trustees to liquidate Boston and thereby make effective the guarantee of the par value of the Boston preferred. This petition was denied on March 6, 1944 in the court's Memorandum of Decision (A. 92a-103a). No appeal was taken from this order.

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[2] 239 I. C. C. 337, modified by the Commission in 244 I. C. C. 239.

On March 6, 1944, the reorganization court approved the Plan of Reorganization.[3]

In the meantime, Claim 82 was still pending before the reorganization court. The court proceeded to treat this claim as one for an allowance (a) on account of a breach of guaranty of the cumulative dividends on Boston preferred and (b) on account of the breach of guaranty of the $100 par value, which allegedly arose out of the disaffirmance of the guaranty in the Plan of Reorganization (A. 43a, 69a-80a).

On July 28, 1944, the reorganization court filed its Memorandum of Decision wherein it allowed a payment of $32 per share for the breach of the guarantee of dividend payments (A. 79a). Insofar as Claim 82 sought an allowance on account of the breach of the guarantee of the $100 on the preferred stock, the court said that "no loss has been proved on account of the breach of this branch of the guarantee" (A. 76a). Thereafter, on August 4, 1944, Order 763 was entered. This decreed that the claim for the breach of guarantee of the par value of the preferred stock ($100) was "wholly disallowed, denied and dismissed" (A. 80a). No appeal was ever taken from this order.

On September 11, 1947, the Court entered its Consummation Order and Final Decree (A. 125a-134a) which provided for closure of the estate and consummation of the plan under Section 77(f) (Pet. App. 24, 25). At that time the amount of the various unsecured claims (including Claim 82) entitled to participate in the reorganization had been determined by the Court in one way or another. Only

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[3] On February 8, 1944, the Commission, by its Fifth Supplemental Report and Order (257 I. C. C. 9) issued its final plan which retained the provisions in earlier plans (1) that the public preferred shareholders of Boston should be included among the holders of unsecured obligations and claims, both for par value and dividends, "to the extent finally allowed by the court for any breach of the contract of guaranty" (Sec. J(17)), and (2) that the guaranty should not be assumed (Sec. K) (A. 107a-108a).

the three large claims were not then liquidated, namely, the claims of "Secured Sixes", the Boston Terminal Trustee and Boston and Providence Railroad [4] (A. 59a-60a).

On December 11, 1947, by its Order No. 1015, the Court formally determined that the amount of allowed claims entitled to participate in the distribution of the new common stock of the reorganized company (including the amount allowed for unpaid dividends on Claim 82 under Order No. 763) aggregated $46,916,727.01 (A. 142a).

On April 5, 1948, the Court issued Order 1016 in which it reserved $60,466,872.99 par value of new common stock for the three unliquidated claims and simultaneously directed the initial distribution of the remaining $46,916,727.01 in par value of the new common stock for all other claims (A. 145a).

Finally, under Order 1028, entered on May 19, 1948, unsecured creditors whose claims were approved prior to the consummation order received, in addition to the initial distribution of new common stock, Certificates of Interest representing pro rata shares in so much of the reserve fund of common shares as exceeded the amount thereof necessary to discharge the three claims which were to be liquidated after the consummation order was entered (A. 60a-61a, 146a-153a). This order also directed the cancellation of the guarantee of the Boston preferred stock (A. 151a).

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[4] In addition to the three claims certain other unfinished business remained to be disposed of, viz., allowances for compensation, final accounting by the Trustees, the acquisition of the Boston and Providence property then in reorganization in a different court and certain other matters which will appear from the reservations of jurisdiction in the order at A. 131a-133a.

(B) The Facts Concerning Delaware's Activities:

Throughout all of the proceedings in the reorganization court and for almost six years after the entry of the Final Decree and Consummation Order, Delaware remained a silent bystander notwithstanding notice and sufficient opportunity to participate. That it has neither a legal nor equitable right to relief is disclosed by a brief history of its conduct.

Between January 27 and March 8, 1944, Delaware acquired 10,000 shares of preferred stock of Boston. Its last purchase of Boston preferred stock was made two days after the entry of the Memorandum of Decision directing denial of the Petition for Order 570 and approximately six months before Order 763 was entered (Pet. App. 16).

For almost nine years, after it first purchased the stock, it took no action whatever in the reorganization proceedings. Almost six years elapsed between the date of entry of the Final Decree and Order of Consummation and May 8, 1953 when it filed a petition in the United States District Court for the District of Connecticut to reopen Order 763 (A. 3a-17a).

Delaware sought relief, not in the reorganization court, but before the Massachusetts Legislature and the Massachusetts courts. As early as May 15, 1944, it publicly announced a plan to secure a liquidation of Boston (A. 53a). It participated in activities which, on June 11, 1946, resulted in the enactment of a law by the Massachusetts Legislature that directed a dissolution of Boston (A. 118a-121a), and joined in proceedings which led to the appointment of a receiver, for Boston, by the Massachusetts court (A. 54a).

It is noteworthy that the Act of 1946 was approved more than a year before the entry of the Final Decree and Order of Consummation and that the proceedings in the Massachusetts Court for the appointment of a receiver were instituted approximately two months before the Final Decree was entered (A. 54a, 125a-134a). At no time, however,

did Delaware participate in the reorganization proceedings or apprise the reorganization court of its activities and interest in the Boston preferred or in the Claim on the guaranty. It was only after the Massachusetts liquidation court directed an allowance of $11.33 per share on Boston preferred that Delaware invoked the aid of the reorganization court.

In its petition to reopen Order 763 filed on May 8, 1953 in the District Court, Delaware sought to recover $88.67 for each share of preferred, representing the difference between the par value of $100 and the $11.33 received through liquidation. Upon analysis of the facts, the reorganization court found:

> "Thus the subject-matter, upon which the present petition is predicated, is clearly shown to have been in the Petitioner's mind, and yet not presented to the reorganization court, for at least two years and eight months before entry of the Final Decree and Consummation Order in these proceedings" (A. 54a-55a).

Argument

Delaware's case is predicated upon an incorrect assumption that Order 763 disallowed Claim 82, because it was not capable of liquidation or of reasonable estimation under Section 57d of the Bankruptcy Act (Pet. 2). Delaware's contention that it has a "legal right" to share in the fund of common stock created by the reorganization court for claims liquidated after the Consummation Order and Final Decree was entered is without merit. Delaware's reliance upon the provisions of Sections J(17) and K of the Plan of Reorganization and upon Sections XI, 2, (f) and (g) of the Consummation Order is misplaced (Pet. 6-7).

Contrary to Delaware's contentions (Pet. 8-9) there is no conflict of decisions between Courts of Appeals which need to be resolved and there is no conflict between the deci-

sions of the two courts below and statements of the Supreme Court. Indeed, Delaware cites no authority to support its assertion. Of Delaware's argument it may be said:

> "Much of petitioner's argument seems to depart from these assumptions [the findings of the District Court] and to invite us to reach conclusions from the voluminous record in this case, contrary to those reached by the two courts below. This we cannot do. A seasoned and wise rule of the court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error." *Comstock* v. *Group of Institutional Investors, etc., et al.*, 335 U. S. 211, 213-214.

It is respectfully submitted that the decision of the court below may be sustained, without reaching the question raised by the petition, upon the grounds that a balancing of the equities in this case alone forecloses Delaware from the relief sought. *Vanston Bondholders Protective Committee* v. *Green, etc.*, 329 U. S. 156, 165.

Moreover, this case turns upon its own facts. If there is a question, apart from the consideration of equities, it is one of interpreting the reorganization court's Memorandum of Decision filed on Claim 82 and its Order 763.

1. Delaware's basic contention is that Order 763 disallowed Claim 82 on the ground that it was not capable of liquidation or reasonable estimation under Section 57d of the Bankruptcy Act.

This is a palpable misconstruction of Order 763. Although the reorganization court considered Claim 82 as one within the contemplation of Section 57d it was "wholly disallowed, denied and dismissed" because "no loss has been proved on account of the breach" of the guarantee of the par value of the preferred (A. 76a). This statement by the reorganization court makes clear that the claim of Delaware was disallowed, not because it was incapable of liquidation or reasonable estimation, but because it was valueless. When the Court determined the validity and value of the claim, it properly exercised the function vested

in it by Congress. *Brown* v. *Gerdes*, 321 U. S. 178; *Pepper* v. *Litton*, 308 U. S. 295.

Clearly, the reorganization court has the power under Section 77(e) (11 U. S. C. 205(e)) to eliminate claims which it determines to be valueless.[5] *Connecticut Railway & Lighting Company* v. *Palmer*, 305 U. S. 493, 505.

The construction of Order 763, namely, that the claim on account of the breach of guaranty of par value was valueless, was consistently accorded to the Memorandum of Decision and to Order 763 by the reorganization court and affirmed by the Court of Appeals on appeal. It is fundamental that the construction of a plan of reorganization by the judge who has superintended the proceedings and has previously dealt with the claim in question is entitled to persuasive weight. *Commission of Department of Public Utilities of Commonwealth of Massachusetts* v. *New York, N. H. & H. R. Co.*, 178 F. (2d) 559 (CA 2), certiorari denied 339 U. S. 943, reh'g den. 339 U. S. 972. This conclusion is re-enforced by the equally basic rule that a reorganization plan which has been "certified by the Interstate Commerce Commission and approved by the court * * * becomes final, is binding upon the debtor, the security holders, and all interested parties and must be enforced as written." *Denver & R. G. W. R. Co.* v. *Goldman Sachs & Co.*, 212 F. 2d 627, 630 (CA 10).

Insofar as Claim 82 sought payment for breach of the guarantee of par value, it was provable within the meaning of Section 63(a) of the Bankruptcy Act (11 U. S. C. § 103(a)) even if it had no legal merit. But it is elementary that a creditor may not share in the assets of a bankrupt or a debtor unless his claim is both provable under one or more of the subdivisions of Section 63(a) of the Act and allowable under Section 57 (11 U. S. C. § 93(a)).

A claim may be disallowed on the merits or because it is barred by a statute of limitations or because it is not ca-

[5] While the factual situation in *Ecker, etc.* v. *Western Pacific Railroad Corporation, etc.*, 318 U. S. 448 is not comparable to the facts in the case at bar, the principles governing the power of the reorganization court to eliminate valueless claims (p. 475 of the opinion) are applicable.

pable of reasonable estimation. In an ordinary bankruptcy proceeding, a valid contingent or unliquidated claim which is not allowed because it is not capable of reasonable estimation or liquidation is deemed not provable under the Act and, under Section 63d of the Act, is not dischargeable in bankruptcy (11 U. S. C. § 103(d)). However, where a provable contingent or unliquidated claim is not allowed, either because it is not valid or because it is barred, Section 63d is inapplicable and the creditor has no claim to the assets of the bankrupt and no claim which may be enforced after the discharge of the bankrupt. *Lesser* v. *Gray*, 236 U. S. 70, 74, 75; *Hargadine-McKittrick Dry Goods Co.* v. *Hudson, et al.*, 122 Fed. 232, 235 (CA 8).

Delaware concedes that Section 63d "is not applicable in railroad reorganizations" (Pet. 10). Delaware suggests, however, that unless it is permitted to share in the fund of common stock reserved for the three claims liquidated subsequent to the consummation of the plan, the Congressional intent underlying Section 57d is frustrated. The short answer to Delaware's claim is that even if Section 63d was applicable to proceedings under Section 77 of the Bankruptcy Act, it could not participate in the fund which has been reserved since claim 82 was disallowed because it was valueless. No rights of any kind remained which Delaware could enforce even if the proceedings involved were in ordinary bankruptcy.

Moreover, if Congress intended that a provable contingent claim, in a reorganization proceeding under Section 77, be accorded the same treatment that applies to valid provable claims which are not allowed and, hence, not discharged in ordinary bankruptcy, then creditors holding such unliquidated claims could proceed directly against the reorganized company. Delaware admits, however, that this is an impossible result in Section 77 reorganizations (Pet. 10) since it would defeat the objective of finality incorporated in Section 77(f) and frustrate the hope of rehabilitation which is the touchstone of Section 77 proceedings.

Delaware fails to recognize that Section 77 does provide the mechanics for treating contingent claims which have not been liquidated before the plan of arrangement has been approved. *Old Colony Bondholders et al.* v. *New York, N. H. & H. R. Co.*, 161 F. (2d) 413 (CA 2), certiorari denied *Institutional Group for Boston Terminal Bonds* v. *New York, N. H. & H. R. Co.*, 331 U. S. 859; *Connecticut Ry. & Lighting Co.* v. *New York, N. H. & H. R. Co.*, 190 F. (2d) 305 (CA 2). Unfortunately, Delaware misconstrues the statements of the authors of Collier on Bankruptcy (Pet. 9). As the authors of Collier on Bankruptcy (5 Collier on Bankruptcy, 536-7) properly point out, provision may be made, as it was in the instance of the three specific unliquidated claims in this case, for the payment of contingent and unliquidated claims after the plan of reorganization has been consummated, by reserving jurisdiction in the reorganization court until such claims are liquidated (A. 133a-134a). This, indeed, is the substitute for, or the correlative of, Section 63d. However, neither Section 63d nor the method contemplated by Section 77 is applicable if there is no valid claim or if the claim is barred or if the claim is held to be valueless, as it was in this case. Where, as in the case at bar, the claim of damage is based upon the disaffirmance of a guaranty and the reorganization court finds that no damage has been shown, it may disallow the claim as valueless. *Connecticut Railway & Lighting Company* v. *Palmer*, 305 U. S. 493, 505.

The reorganization court and the Court of Appeals concluded that there was no claim and, consequently, no legal or equitable right to share in the fund of common stock reserved for unliquidated claims. *Vanston Bondholders Protective Committee* v. *Green, etc.*, 329 U. S. 156, 170.

2. The Memorandum of Decision on Claim 82, by its very terms, disposes of Delaware's contention that its claim was not allowed because it was incapable of liquidation or of reasonable estimation. As the Court of Appeals in this case said, the claim was liquidated before the Final Decree

and Consummation Order was entered (Pet. App. 21). Earlier in its opinion, the Court of Appeals said:

> "Order 763 by the very force of its language clearly took Claim 82 out of the category of unliquidated claims contemplated by the provision as to them" (Pet. App. 18).

Delaware's contention that its "legal right" to share in the fund was preserved by the provisions of Sections J(17) and K of the Plan is conclusively disposed of by the reorganization court's finding. As the reorganization court said, these sections of the plan "were speaking prospectively as of February, 1944" (A. 48a). On August 4, 1944, except as to the claim for dividends, Claim 82 ceased to be an unliquidated claim, as the reorganization court and the Court of Appeals determined (A. 48a; Pet. App. 18).

As for Delaware's claim that the provisions of Section XI, 2, (f) and (g) of the Final Decree and Consummation Order reserved jurisdiction of the Court to allow its claim, the answer of the District Court is, again, dispositive:

> "By the entry of Order 763, Claim 82 was plainly removed from the category of claims provided for by these subparagraphs (f) and (g). This is sufficiently attested by the concise language of these subparagraphs which limited their coverage to claims 'the amount of which shall not have then (September 11, 1947) been fixed' * * * subparagraphs (f) and (g) were included in the Final Decree and Consummation Order only to permit the Court by an appropriate reservation of jurisdiction to provide equal treatment in accordance with the Plan for three large claims not then liquidated. These were the claims of the so-called Secured Sixes, the claim of the Boston Terminal Company trustee and the claim of the Boston and Providence Railroad Company * * *" (A. 49a).

3. Delaware does not urge the equities of its position (Pet. p. 8); it suggests, however, that its "legal rights" are sufficient to sustain its position. Delaware's reluctance

to discuss the equities is understandable since it recognizes its inability to demonstrate that measure of substantial injustice which is required to reopen Order 763 and to impair the intervening rights of other creditors. *Bondholders, Inc.* v. *Powell, et al.*, 190 F. 2d 74, 81 (C. A. 4), certiorari denied 345 U. S. 921. Indeed, if there were any "legal rights" they were rendered unenforceable by the failure to take timely appeals from Order 763 and the Final Decree.

It must be conceded that Delaware did not participate in any of the reorganization proceedings notwithstanding notice thereof. It is equally clear that for almost six years after the plan of reorganization had been approved, Delaware took no action on Order 763 despite the fact that it had notice of all of the proceedings. As far back as May, 1944, Delaware planned to secure a liquidation of Boston. In January, 1945, Delaware participated in proceedings to secure a liquidation of Boston by a statutory enactment. In June, 1946, the Massachusetts Legislature annulled the charter of Boston and provided for its receivership and liquidation. On July 2, 1947, Delaware joined with other preferred shareholders in a petition to the Massachusetts court for receivership and liquidation of Boston. All of this occurred before the Final Decree and Order of Consummation was entered by the reorganization court. Delaware had ample opportunity to apprise the reorganization court that liquidation by legislative fiat was contemplated or to participate in the reorganization proceedings.

Notwithstanding its knowledge of the pendency of liquidation proceedings, it made no effort to disclose its interest to the court as a preferred stockholder and made no attempt, for almost six years, to invoke equitable remedies available to it in the reorganization court and took no appeal from Order 763.

In the meantime, the rights of other creditors had matured. Delaware now seeks to alter and impair these

rights. A balancing of the equities discloses Delaware's untenable position. *Grand Union Equipment Co.* v. *Lippner*, 167 F. (2d) 958 (C. A. 2); *Mohonk Realty* v. *Wise Shoe Stores*, 111 F. 2d 286 (C. A. 2).

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

Dated: New York, N. Y.
February 23, 1956.

Respectfully submitted,

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The opinion of the District Court for the District of Connecticut is reported at 128 F. Supp. 550 (A 38a).* The opinion of the Court of Appeals is reported at 227 F. 2d 291 (App. 12).

Question Presented

The Petitioner (hereinafter referred to as "Delaware") here seeks to review a determination of the Court of

* This and similar references are to the Petitioner's appendix in the Court of Appeals. The appendix to the joint brief for the appellees in the Court of Appeals will be referred to as "J" followed by page references. References to the appendix to the Petition for Certiorari will be referred to as "App." followed by page references.

Appeals for the Second Circuit which unanimously affirmed an order of the United States District Court for the District of Connecticut (Hincks, J) entered in the reorganization proceedings of the respondent, The New York, New Haven and Hartford Railroad Company (hereinafter referred to as "New Haven"). The order of the District Court denied a petition of Delaware for the modification of a previous order which had disallowed, denied and dismissed a claim upon the New Haven's guaranty of par value of the publicly held preferred stock of Boston Railroad Holding Company (the "Holding Company").

This guaranty was contingent upon the liquidation of the Holding Company and a deficiency resulting from the sale of its assets. Under the Holding Company's charter such a liquidation could be brought about only upon the petition of New Haven as holder of a majority of the Holding Company's preferred shares. Two attempts to compel the New Haven Trustees to liquidate the Holding Company having failed during the reorganization proceedings, the District Court "wholly disallowed, denied and dismissed" the claim on the guaranty of par value (A 80a), since that guaranty was to become effective "only upon a contingency which, in so far as the proofs show, may and probably will never come to pass" (A 76a). No appeal or other objection was taken with respect to this determination by Delaware or any other party.

Delaware thereafter avoided any participation in the reorganization proceedings and permitted the Consummation Order and Final Decree to be entered without objection. On the other hand, Delaware, without any disclosure of any kind to the court, sponsored and obtained special legislation in Massachusetts which resulted in the dissolution of the Holding Company. Delaware, having received in the statutory dissolution proceedings far less than it

had anticipated, thereupon, almost six years after the Consummation Order and Final Decree, filed in this proceeding the petition here involved.

Pursuant to the Plan of Reorganization the court had set aside a fund of common stock to satisfy the claims of three specified groups of creditors which could only be liquidated after consummation. At this point the rights of the creditors in question and of other creditors whose claims already had been allowed, including this respondent, Connecticut Railway and Lighting Company, became vested in this fund.

Delaware's petition to this Court *is based exclusively* on "the narrow issue of law" which it asserts is presented by its contention that, "where a claim is disallowed, denied and dismissed under Section 57(d) (of the Bankruptcy Act), it is by definition unliquidated and of uncertain value", that its claim was "clearly of the latter variety" and hence that it was entitled *as a matter of law* to reopen the matter (petition, p. 8).

The question here presented in actuality is as to whether, in the light of all the facts, Delaware now has a legal right to obtain a modification of the order of disallowance of the claim on the guaranty of par value and to share in the fund.

STATEMENT

Introductory

The Holding Company was created by a special act of the Massachusetts legislature for the sole purpose of acquiring and holding securities of The Boston & Maine Railroad (A 3a).

When the New Haven reorganization proceedings started in 1935 (and during the course of the proceedings)

the New Haven held the entire 31,065 shares of common stock of the Holding Company (A 3a) and 247,759 out of the total of 272,939 preferred shares (A 4a-5a). Of the 25,180 preferred shares not held by the New Haven, 1,030 were in the treasury of the Holding Company, and 24,150 (the so-called "publicly held preferred shares") were held by various other persons and corporations (A 5a). These latter bore the New Haven's guaranty of payment of dividends at the rate of 4% per annum and of $100 (par value) in case of liquidation of the Holding Company and any deficiency resulting from a sale of its assets (A 4a). Such liquidation could be brought about under the Holding Company's charter only upon petition of the New Haven as holder of "a majority" of the preferred shares (A 22a Sec. 4).

On March 30, 1936 an unsecured claim (No. 82, A 65a) was filed for breach of the New Haven's guaranty. On August 4, 1944 this claim was allowed at $32 per share with respect to dividends, but as to par value it was "wholly disallowed, denied and dismissed" (Order No. 763, A 80a). No appeal was taken.

Thereafter, on September 11, 1947, after a hearing, the Consummation Order and Final Decree was entered (A 125a). A further period of almost six years elapsed, when, on May 11, 1953, Delaware, as holder of 10,000 of the preferred shares, filed a petition seeking to reopen the proceedings with respect to the disallowance, denial and dismissal of the claim on the guaranty of par value.

Judge Hincks denied the petition, (a) overruling Delaware's contention that the court had expressly reserved jurisdiction to reopen the disallowance at that late stage in the proceedings (A 49a), and (b) further holding that Delaware's intentional failure to participate in the litigation on the claim or to make seasonable appli-

cation for revision of the order of disallowance before that order had "become hardened into the finality of a Final Decree", had deprived Delaware of any equitable standing (A 50a, 56a).

The Court of Appeals, in an opinion by Chief Judge Clark, unanimously affirmed (App. 12-22), with the result that the instant petition for certiorari has been filed in this Court.

Treatment of New Haven's Unsecured Creditors

On February 8, 1944 the Interstate Commerce Commission issued its Fifth Supplemental Report and Order on New Haven's Plan of Reorganization (257 I.C.C. 9), which was the plan that was finally approved, confirmed and consummated. Under this plan the holders of unsecured obligations and claims were to receive new common stock of New Haven, this stock to be distributed among such creditors "upon the basis of the relationship between the amount of each claim as finally allowed by the court to the total amount of all such claims" (A 107a).

On December 11, 1947 the court entered its Order No. 1015 fixing $46,916,727.01 as the amount of the then allowed claims of the unsecured creditors entitled to participate in the distribution of New Haven's common stock (A 141a-142a).

In the interest of procuring an initial distribution, New Haven, on February 25, 1948, filed a petition for the determination of the amount of common stock to be reserved for unliquidated claims (A 143a). The hearing on this petition was devoted to various estimates of the maximum amount of the only three remaining groups of unliquidated claims before the court, i.e. those of the so-called "Secured Sixes", the claims on behalf of the trustee

and bondholders of the Boston Terminal Company, and the claim on the disaffirmance of the lease of the Boston and Providence Railroad Company. After hearing, by its order of April 5, 1948 (A 144a-145a) the court directed that $60,466,872.99 par value of stock should be reserved and the balance of $46,916,727.01 distributed to the holders of the unsecured claims theretofore allowed.

The court's subsequent order of May 19, 1948 (A 146a, 150a-151a, par. 4) provided for so-called certificates of interest (Ex. P-10, A 153a) which were to be issued to creditors for claims already allowed in order to evidence their interest in this reserved balance of stock.

As Judge Hincks explained (A 60a-61a):

> "Thus, these certificates constituted a device to carry into effect the basic provision of the Plan as embodied in the Final Decree and Consummation Order whereby the entire common stock of the reorganized New Haven should be allocated to unsecured creditors, *pro rata*, in proportion to the amounts of their respective claims as finally allowed. This right of participation vested in unsecured creditors upon entry of the Final Decree and Consummation Order."

Judge Hincks further said (A 61a-62a):

> "But by that Order, unsecured creditors who in return for the surrender of their claims received the initial distribution of stock and Certificates of Interest became entitled, *pro rata*, eventually to receive, upon surrender of their Certificates of Interest, the entire remainder of the stock reserved under Order 1016, except so much thereof as might be required for an initial distribution thereof to any of the three claimants for the adjudication of whose claims jurisdiction had been reserved."

Of the three groups of claimants in question, the Secured Sixes were thereafter paid by New Haven and the Boston Terminal Company claims have been liquidated and those creditors have received their distribution of stock and certificates. There remains only the claim of the trustee of the Boston and Providence Railroad Company.

What Delaware seeks to achieve by its attempt to reopen the long disallowed claim upon the guaranty of the Boston Railroad Holding Company preferred stock is participation in the reserved common stock of New Haven, with a resultant dilution of the interests of the holders of the certificates, outstanding for a number of years.

The Decision on the Guaranty

As has been said, on March 30, 1936, shortly after the beginning of the reorganization, an unsecured claim was filed upon the guaranty, which was known as Claim No. 82 (A 65a-67a). Subsequently, the management of the claim was assumed by a Protective Committee for the preferred stockholders, which committee also filed a petition for Order No. 570, seeking to compel action by the New Haven Trustees looking to a liquidation of the Holding Company, "the contingency upon which the guaranty of par value depended" (A 42a).

When it became apparent that the final plan of reorganization would provide for the disaffirmance of the guaranty, Judge Hincks denied the petition for Order No. 570 (see opinion A 92a-103a), and thereafter, by his Memorandum of Decision dated July 28, 1944 (A 69a-79a), allowed the claim of the publicly held preferred stock for breach of the dividend-payment guaranty at $32 per share (A 79a) but denied the claim as to the guaranty of par value (A 76a). In this connection Judge Hincks said that no liquidation of the Holding Company had yet occurred,

that there was no proof that a liquidation or sale would occur in the future, that under the Massachusetts statute a sale of the Holding Company portfolio could be forced only on an application of a majority of the preferred stock and that there was no proof that such majority (the New Haven Trustees) would ever make such an application (A 76a). Judge Hincks thereupon held (A 76a):

> "Since the guarantee of principal is stated to become effective only upon a contingency which, in so far as the proofs show, may and probably will never come to pass, I must hold that no loss has been proved on account of the breach of this branch of the guarantee."

Order No. 763, entered upon the decision, after allowing the claim upon the guaranty of dividends, provided (A 80a):

> "(2) That any and all other claims against the estate of the Principal Debtor herein on behalf of the preferred stock of Boston Railroad Holding Company be and they hereby are *wholly disallowed, denied and dismissed.*" (Italics supplied.)

This order was entered on August 4, 1944. No appeal from it was taken by any interested party, nor was any attempt ever made to modify it until the instant petition of Delaware (A 3a-17a) dated May 8, 1953, almost nine years later.

Lack of Equity in Delaware's Conduct

On January 27, 1944, a few days before the Commission issued its Fifth Supplemental Report and Order and while Petition for Order No. 570 and Claim No. 82 were still pending and undecided, Delaware began to purchase

preferred shares of the Holding Company and by March 8, 1944 had acquired 10,000 shares (A 45a).

On March 6, 1944, while Delaware was still purchasing shares, the court denied the Petition for Order No. 570, holding that only the New Haven's Trustees, as holders of a majority of the preferred stock, could bring about a liquidation of the Holding Company (A92a-A103a), which they could not be required to do (A95a, A103a). Delaware's purchase of the stock was thereafter ratified by its Executive Committee on March 10, 1944 (J 10a-13a).

With Petition for Order No. 570 out of the way, the court, on May 22, 1944, directed the filing of briefs not later than June 15, 1944 on Claim No. 82. The Court's order was received by Delaware's counsel and was a matter of consideration (Exs. R-5, R-6; J 4a-5a, 7a). However, no brief was filed by Delaware, a policy of inaction evidently having been decided upon.

That this is so is clear from the fact that Delaware, as we have said, neither appealed from the order of August 4, 1944 dismissing the claim with respect to the guaranty of par value nor made any attempt to obtain a modification of the order for almost nine years. Moreover, Delaware thereafter sedulously avoided informing the court as to its subsequent activities elsewhere.

In the following year, on January 12, 1945, a bill was introduced in the Massachusetts legislature for the dissolution of the Holding Company (J 3a). Delaware actively supported this legislation (A 54a). In 1946 the dissolution act was passed (A 118a). This act terminated and annulled the corporate existence of the Holding Company (A 118a, Sec. 1) and in effect fixed July 1, 1947 as the time for proceedings looking to the sale of its assets (A 118a, Sec. 3).

On the following day, July 2, 1947, Delaware and other preferred stockholders of the Holding Company, pursuant

to the dissolution act, filed a petition in a Massachusetts court for the receivership and liquidation of the Holding Company, which in turn filed an answer in opposition attacking the constitutionality of the legislation (A 54a).

On September 11, 1947, as we have said, the Consummation Order and Final Decree (A 125a) was entered after a hearing in the New Haven proceeding. At that time the amount of various unsecured claims entitled to participate in the plan had been determined by the court in one way or another, but there had been no disposition of the three groups of unsecured claims to which we have previously referred, and for which new common stock was required to be reserved under the plan. The general scheme of the order was to permit later distribution of the stock on the unsecured claims that had been fixed and to reserve enough to cover the claims that constituted unfinished business. This order was entered without intervention or opposition by Delaware (A 54a).

Delaware's continued abstention from the New Haven proceedings was and continued to be deliberate. A notice having been published on September 29, 1947 with respect to the treatment of securities, including Holding Company preferred stock, in the New Haven reorganization (R. 10, J 22a-23a), Delaware's general counsel raised the question with its Boston counsel as to whether any action should be taken (J 22a), the response by Boston counsel being that "in view of the small value attributable to (New Haven common) stock, I should hesitate before ever getting into a position where we shall have accepted something for the New Haven's breach of guaranty" (J 26a).

Thereafter, on May 24, 1948, in pursuance of the court's order of April 5, 1948 directing the initial distribution of common stock to the holders of unsecured claims thereto-

fore allowed, a notice was published (Ex. R-12, J 28a) providing, in the case of the Holding Company preferred stockholders, among other things, for the submission of their certificates for cancellation of the New Haven guaranty. A copy of this notice was transmitted by Delaware's general counsel to its Boston counsel on that date (Ex. R-12, J 27a) with the comment that it was their view "that we should do nothing at this time either", awaiting the final outcome of the liquidation proceedings. To this Boston counsel responded the following day (Ex. R-13, J 30a) that "we all seem to be in accord as to the importance of not seeking or accepting at this time any of the common stock of the New Haven Railroad."

Throughout this period the Massachusetts liquidation proceedings continued. Despite the New Haven's opposition, those proceedings, on October 4, 1948, were held constitutional (*Delaware and Hudson Co. et al.* v. *Boston Railroad Holding Co. et al.*, 323 Mass. 282, appeal dismissed March 28, 1949, 336 U. S. 932). Thereafter, on June 15, 1949, the Supreme Court of Massachusetts appointed a liquidating receiver.

On December 7, 1949 Delaware filed a petition in the Holding Company receivership in which it took the position that all of the publicly held preferred shares had priority over the New Haven shares. However, on November 9, 1951 the Supreme Court of Massachusetts decided that, because of the discharge of the guaranty through the New Haven Consummation Order and Final Decree, the publicly held preferred shares had no priority in liquidation (*Delaware and Hudson Co. et al.* v. *Boston Railroad Holding Co. et al.*, 328 Mass. 63, cert. den. 343 U. S. 920).

As a result of that holding, instead of Delaware receiving the par value of its stock as it had expected, there was distributed to all of the holders, including Delaware,

only $11.32 per share. Notice of this allowance was sent to preferred shareholders on March 6, 1953.

Thereupon, on May 11, 1953, Delaware, having been disillusioned by the result in Massachusetts, filed its petition in the New Haven proceedings (A 3a), seeking to reopen Claim No. 82 and to procure the allowance of a general claim, payable in common stock from the reserved shares, for the difference between what it received in the Massachusetts receivership and the par value of its shares.

The Intervening Rights of Others

The court's order of May 19, 1948, the Order Approving Procedure (A 146a-152a), provided for the certificates of interest. As to these, as we have pointed out, Judge Hincks said (A 61a):

> "This right of participation *vested* in unsecured creditors upon entry of the Final Decree and Consummation Order." (Italics supplied.)

Consequently, as Judge Hincks noted (A 63a), ever since the Final Decree and Order of Consummation the holders of certificates of interest, in their dealings, have been entitled to rely upon their right to participate in the distribution of the block of New Haven common stock, "the available amount of which was subject to reduction only by possible allowances of the three claims above described". And the court added:

> "And the record shows that throughout the period there have been active dealings in the Certificates."

To grant the petition of Delaware would seriously impair the vested rights of the certificate holders, and to grant all the relief sought would result in a reduction of about 7% in the common stock ultimately to be issued

from reserved shares to holders of certificates of interest (A 63a).

To take the case of this respondent, Connecticut Railway and Lighting Company, it received $4,589,318.87 face value of certificates of interest (cf. J 33a). The complete success of Delaware's petition would result in a loss to that respondent of 3,420 shares of new New Haven stock, if, as seems likely (A 62a), no stock is to be issued to the Boston and Providence interests. The loss to Connecticut Railway and Lighting Company would also be substantial, though less than the above, if only Delaware and a few other preferred stockholders in like situation were to get the relief Delaware asks. As Judge Clark pointed out (App. p. 22):

> "To allow Delaware any satisfaction of its claim would impair the rights of Certificate Holders by a like amount. There have been active dealings in the Certificates since their issuance. We agree with Judge Hincks that the intervention of vested rights furnishes an additional reason for refusing to reopen the proceedings."

ARGUMENT

A

As we have stated, Delaware's petition in this Court is based exclusively upon its assertion that where a claim is disallowed, denied and dismissed under Section 57(d) of the Bankruptcy Act, it is by definition unliquidated and of uncertain value.

We can find no previously reported instance of such a contention, and as Judge Clark said in his opinion for the Court of Appeals (App., p. 21):

> "We find it difficult to conceive of reasonable reliance on the preservation of a claim as 'unliquidated' when that claim has been 'wholly . . . denied and dismissed'."

Delaware argues (petition, pp. 9-10) that it never has been suggested in ordinary bankruptcy proceedings, and therefore should not be suggested in a proceeding under Section 77 of the Bankruptcy Act, that a disallowance under Section 57(d) amounted to a liquidation at zero. We know of no authority holding that the determination of a claim may not be at zero, and that is precisely what Judge Hincks intended to do in the instant case.

Section J(17) of the Plan provided (A 6a-7a):

> "The public holders of 24,150 preferred shares of the Boston Railroad Holding Company shall, *to the extent finally allowed by the Court* for any breach of the contract of guaranty, both for par value and dividends, be included among the holders of unsecured obligations and claims." (Italics added.)

Section K of the Plan, in so far as here pertinent, provided (A 7a):

> "No payment shall be made by the reorganized company upon, or on account of, such guaranty of the preferred stock of the Boston Railroad Holding Company, except as provided in clause (17) of section J hereof . . ."

The Plan was approved by the reorganization court on March 6, 1944 (A 48a). Promptly thereafter the court proceeded to consider Claim No. 82, for the purpose of establishing the basis for its participation under the Plan. On August 4, 1944 the claim was adjudicated (Order No. 763, A 80a) with a denial with respect to the guaranty of par value (A 76a).

Therefore, what Judge Hincks did was to remove Claim No. 82 from the category of unliquidated claims, holding as to the guaranty of par value that no loss had been proved. Judge Hincks explained the effect of his decision when he stated (A 48a):

> "Thus any provisions of the Plan which seemed to place the claim of owners of the publicly-held preferred stock of the Holding Company in the category of the unliquidated claims *were speaking prospectively as of February, 1944.* Claim 82 was definitely and finally removed from that category by Order 763 (August 4, 1944) whereby that claim, except for the allowance of $32 per share on account of the dividend guarantee was unequivocally 'wholly disallowed, denied and dismissed.' In the face of the language in that Order and in the light of the memorandum which preceded it it is wholly untenable to urge now that the claim on account of a possible breach of the par value guarantee was never adjudicated." (Italics added.)

Any construction of a plan of reorganization by the district judge who is familiar with every phase of it is necessarily entitled to great weight. This is particularly true where, as here, that judge has previously dealt in some detail with the very provisions here in question (*Commission of Department of P. U.* v. *N. Y. N. H. & H. R. Co.*, 178 F. 2d 559, 563, 2 Cir., 1949, cert. den. 339 U. S. 943). To the same effect see Judge Clark's opinion (App. p. 19).

B

As we have said, Delaware presents as its sole basis for certiorari the contention that, where a claim is disallowed, denied and dismissed under Section 57(d), it

is by definition unliquidated and of uncertain value (petition, p. 8). However, despite Delaware's express limitation of the question presented, it contends further that in order for a plan to satisfy the requirement that it be fair and equitable (Section 77(e)), provision should be made "to pay to holders of such claims, if they become absolute, the value of the securities that would have been allotted to them had the claims been absolute at the time of reorganization" (petition, p. 9). This belated suggestion that the plan was not fair and equitable comes twelve years after the plan was approved on March 6, 1944. At that time Delaware was already a holder of preferred stock of the Holding Company, but did not see fit to appeal from the order of approval and in fact, as we have seen, sedulously avoided any participation in the New Haven reorganization.

So it was that Judge Clark said in the opinion of the Court of Appeals (App. pp. 21-22):

> "Although in general a plan may not destroy a contingent claim without providing for it in some manner—see *Old Colony Bondholders* v. *New York, N. H. & H. R. Co.*, 2 Cir., 161 F. 2d 413, 428, certiorari denied *Institutional Group for Boston Terminal Bonds* v. *New York, N. H. & H. R. Co.*, 331 U. S. 859—we conclude that here, where a claimant has deliberately refrained from disclosing to the court before consummation the possibility of liquidation by legislation, it cannot now be heard to assert that the Plan must be interpreted to provide for its 'unliquidated' claim."

C

Even if we were to indulge in the assumption, *arguendo*, that Delaware's position was otherwise sound, its contentions are not here available since the equities have run

against it. Both of the courts below recognized a power in the court to reopen a final decree in railroad reorganization proceedings, but both courts also recognized that such a power should not be exercised in this case (A 56a, App. p. 20). Judge Clark summed it up when he said (App. 20):

> "In this case the equities are so strongly adverse to Delaware that the district judge clearly abused no discretion vested in him when he refused to act."

Delaware here says (petition, p. 8):

> "Petitioner believes that the Courts below incorrectly balanced the equities in this matter, but it recognizes that such issue may not be one of sufficient general importance to warrant this Court's consideration. Therefore, petitioner at this time restricts its prayer for review to the narrow issue of law presented. Thus petitioner submits that it was entitled *as a matter of law* to the relief requested by its petition to the Bankruptcy Court."

Delaware's abstention from any activity with respect to the order was due to its deliberate decision not to participate in the New Haven proceedings. This decision in turn was motivated by its plan to foment legislation in Massachusetts dissolving the Holding Company.

This program was at no time disclosed to the District Court, either by way of information or by seeking a reopening of Order No. 763, until, to use Judge Hincks' phrase, that order had "become hardened into the finality of a Final Decree" (A 56a), and indeed until some six additional years thereafter.

It was only when Delaware had been disappointed and disillusioned by the result of the Massachusetts statutory

liquidation that it sought on May 11, 1953 to modify the then ancient Order No. 763, and this at a time when, as we have shown, intervening rights had long since vested.

These intervening rights were those of the holders of certificates of interest which had vested on the basis of the Final Decree. As we have pointed out (p. 12, *supra*), to grant Delaware's petition would seriously impair these vested rights. Moreover, there have been active dealings in the certificates since their issuance.

It must be assumed, as did the courts below, that these certificates have been traded in with reliance upon the orders of the reorganization court, and without knowledge of Delaware's undisclosed intentions. To grant Delaware's petition would therefore inevitably prejudice the rights of various third parties, and in such a situation the courts have consistently held that a final decree will not be reopened. *Standard Steel Works* v. *American Pipe and Steel Corporation*, 111 F. 2d 1000, 9 Cir., 1940; *North American Car Corporation* v. *Peerless W. & V. Machine Corporation*, 143 F. 2d 938, 2 Cir., 1944; *Duebler* v. *Sherneth Corporation*, 160 F. 2d 472, 2 Cir., 1947; *Mohonk Realty Corporation* v. *Wise Shoe Stores, Inc.*, 111 F. 2d 287, 2 Cir., 1940, cert. den. 311 U. S. 654; *Grand Union Equipment Co. v. Lippner*, 167 F. 2d 958, 2 Cir., 1948.

If Delaware ever had "a legal right", as it here contends, such "legal right" manifestly was long ago rendered unenforceable by the entry of the Final Decree and by the adverse equities which both courts below found existed, findings which are not here sought to be reviewed.

Summary

Delaware seeks certiorari upon the assertion that under Section 57(d) of the Bankruptcy Act it is entitled as a matter of law to the relief requested by its petition to the

Bankruptcy Court. Delaware moreover advances the additional contention that the Plan was not fair or equitable, having made no provision to pay to the public holders of the Holding Company preferred stock "the value of the securities that would have been allotted to them had the claims been absolute at the time of reorganization."

Whatever may have been the "legal" position of Delaware years ago when the court was considering the Plan and Claim No. 82, Delaware's deliberate abstention from participation in the reorganization proceedings, while it gambled upon the results of legislative dissolution in Massachusetts, and while it permitted the intervening rights of others to vest, necessarily eliminated any "legal right".

Therefore, the "narrow legal question" which Delaware presents to this Court in reality does not exist at all and there is nothing for its consideration.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, N. Y., February 23, 1956.

Respectfully submitted,

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